LambdaNet Communications GmbH
Günther-Wagner-Allee 13
D 30177 Hannover
Germany

Phone: +49 (0) 511 8488 2700
Fax: +49 (0) 511 8488 2709

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VIA ELECTRONIC MAIL

Fr0056@ustr.ustr.gov

Rhonda Schnare
Office of General Counsel
ATTN: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

RE: GERMANY, SPAIN: WTO General Agreement on Trade in Services

Dear Ms. Schnare:

LambdaNet Communications Group ("LambdaNet") welcomes the opportunity to file reply comments in this proceeding.

LambdaNet[1] is a European carrier that is majority-owned by U.S. investors. LambdaNet connects key European data centres and 104 cities in 10 countries. LambdaNet's 22,000-kilometer fibre and IP network is one of the most powerful and closely woven networks in Europe, servicing more than 230 customers. Its European customer base is stable, serving a broad range of telecommunications operators (telecommunications carriers, voice/access, mobile, ISP, ASP and Cable TV) including large carriers, such as Vodafone D2, Cable & Wireless and Telia. Additionally, LambdaNet operates Metropolitan Area Networks (MANs) in fourteen European centers of business - London, Amsterdam, Brussels, Paris, Marseilles, Bordeaux, Strasbourg, Lyon, Madrid, Vienna, Frankfurt, Dusseldorf, Munich and Hamburg. LambdaNet offers traditional transport services (wavelength, bandwidth and collocation services) and delivers higher value services that include advanced IP transport (IP Transit, Virtual Private Networks).

LambdaNet, being in the trenches of battling with European incumbents for several years, supports CompTel's submission to the USTR in this proceeding. LambdaNet hopes that the information provided below shed some more light on the scenario. Of particular concern to LambdaNet is the situation in Germany, Europe's largest telecommunications market, regarding

[1] Website: www.lambdanet.net

(1) the incumbent's excessive leased lines prices, (2) the provisioning intervals/enforcement, and, generally, (3) prices for dark fibre capacity in Europe, in particular in Spain.

(1) Excessive Prices of Leased Lines in Germany

LambdaNet wholeheartedly agrees with CompTel (pages 12 to 14 of CompTel's comments) that in this sector Deutsche Telekom's "obstructionism has burdened competitive carriers with serious obstacles as well as discouraged potential new entrants" and that, hence, Germany is in violation of Sections 1.1 and 2.2 of the *Reference Paper* and Section 5(a) GATS *Telecommunications Annex*, as described in CompTel's comments. This is one of the key issues that the USTR should address with the German government and the European Commission.

The development in 2002 in Germany in this vital market sector has not been encouraging. In its decision of June 12, 2002, the German regulator RegTP set new tariffs for leased lines provided by incumbent Deutsche Telekom AG ("DTAG"), valid through April 30, 2003. LambdaNet filed a law suit against this decision on July 14, 2003 at the competent Cologne Administrative Court. The principal aim of this legal action is, as further explained below, to enforce the application of the relevant criteria according to German telecoms law ("TKG") governing cost-based pricing decisions.

It is LambdaNet's firm opinion that the regulator's pricing decision in the leased lines sector infringes with the principle of cost-orientation which is firmly embraced by the TKG. Under German and EU law, the incumbent carrier DTAG, being the market dominant provider of leased lines, is obliged to seek prior approval of its leased line tariffs from RegTP. Alternative providers compete with DTAG's leased line products (*Carrier-Fest-Verbindungen, CFV; Standard-Festverbindungen, SFV)*, but depend on DTAG's products to serve their own customers (i.e., providing local access to their customers). According to the laws and regulations under the TKG, RegTP, prior to an approval of DTAG's leased lines rates, must determine whether the proposed rates are in line with the so-called concept of efficient provisioning costs *(Kosten der effizienten Leistungsbereitstellung*). According to the TKG, DTAG is obliged to provide verifiable cost data when filing for a new rate approval. Repeatedly DTAG has failed to meet this standard, and in particular the current leased-lines rates are not in line with this principle: In its application for approval of its leased-lines rates dated April 3, 2002, DTAG requested higher rates for some types of leased lines, whereas for other types of leased line types DTAG asked for significantly lower rates. DTAG did neither explain this discrepancy, nor was the application supported by detailed, verifiable cost data.

RegTP found in its leased lines ruling that under usual circumstances the regulator would have dismissed DTAG's application for failure to comply with necessary cost evidence. However, RegTP did not. Rather, RegTP decided to approve the leased lines tariffs DTAG had applied for, with minor exceptions, by measuring them solely against the rates in other countries (international benchmarks). Unfortunately, this international benchmark comparison only covered a few countries and carriers and RegTP compared apples with oranges. Many of the carriers that RegTP used for its benchmark are based in the USA, where carriers not only use a transmission technology different from Germany (Sonet), but also calculate their charges differently: For instance, DTAG applied for lower leased lines rates for 34 Mbit/s connections compared to rates for higher capacity 155 Mbit/s connections. RegTP resolved this inconsistency by increasing the 155 Mbit/s tariffs just to the 34 Mbit/s level. This approach is not acceptable and clearly favours DTAG because the capacities differ by a factor of four.

Within the regulatory proceeding at RegTP, several competitors had contributed written and oral statements, among them LambdaNet, but they fell on deaf ears. All participating competitors have unanimously criticised the DTAG's inconsistent tariff structure. They described the potentially harmful effects of massive rate decreases, which are not justified (1) on the basis of cost evidence or (2) infringe with the LRIC (long run incremental) cost model. The most imminent danger is, as some participants in this proceeding, including LambdaNet, have pointed out, that DTAG applied for artificially high tariffs in segments where is still little competition (i.e., local access). This stifles competition and gives DTAG free reign to use, once more, its predatory pricing strategy to undercut competitors' offers and to push them out of lucrative market segments where competitors have succeed remarkably in the recent past.

In sum, RegTP's decisions in the leased lines sector lack consistency with regard to cost measures and rates since they solely rely on flawed international benchmarks with its inherent shortcomings, instead of forcing DTAG to provide clear, verifiable cost data.

(2) Leased Lines Provisioning in Germany: DTAG is Dragging its Feet

LambdaNet agrees with CompTel (p. 13 of the Comments) that leased lines provisioning and their effective enforcement is a key issue for the competitors. In its decision of October 9, 2001, RegTP set binding time limits for DTAG's delivery of carrier leased lines (*Carrier-Fest-Verbindungen, CFV*): in short, eight weeks if no installation work needs to be carried out, four months in the event of minor installation work, and six months in the event of substantial installation work. The decision was supplemented by RegTP's decision of May 31, 2002 that CompTel mentions in its comments, which aims at setting binding time limits for delivery to competitors of leased lines connecting end-users (*Standard-Festverbindungen, SFV*): 12, 15 and 30 working days for bandwidth of 64 kbit/s, 128kbit/s to 2 Mbit/s and over 2 Mbit/s respectively. In addition, DTAG was ordered to offer competitors all contractual conditions and additional technical facilities that DTAG offers to its own customers.

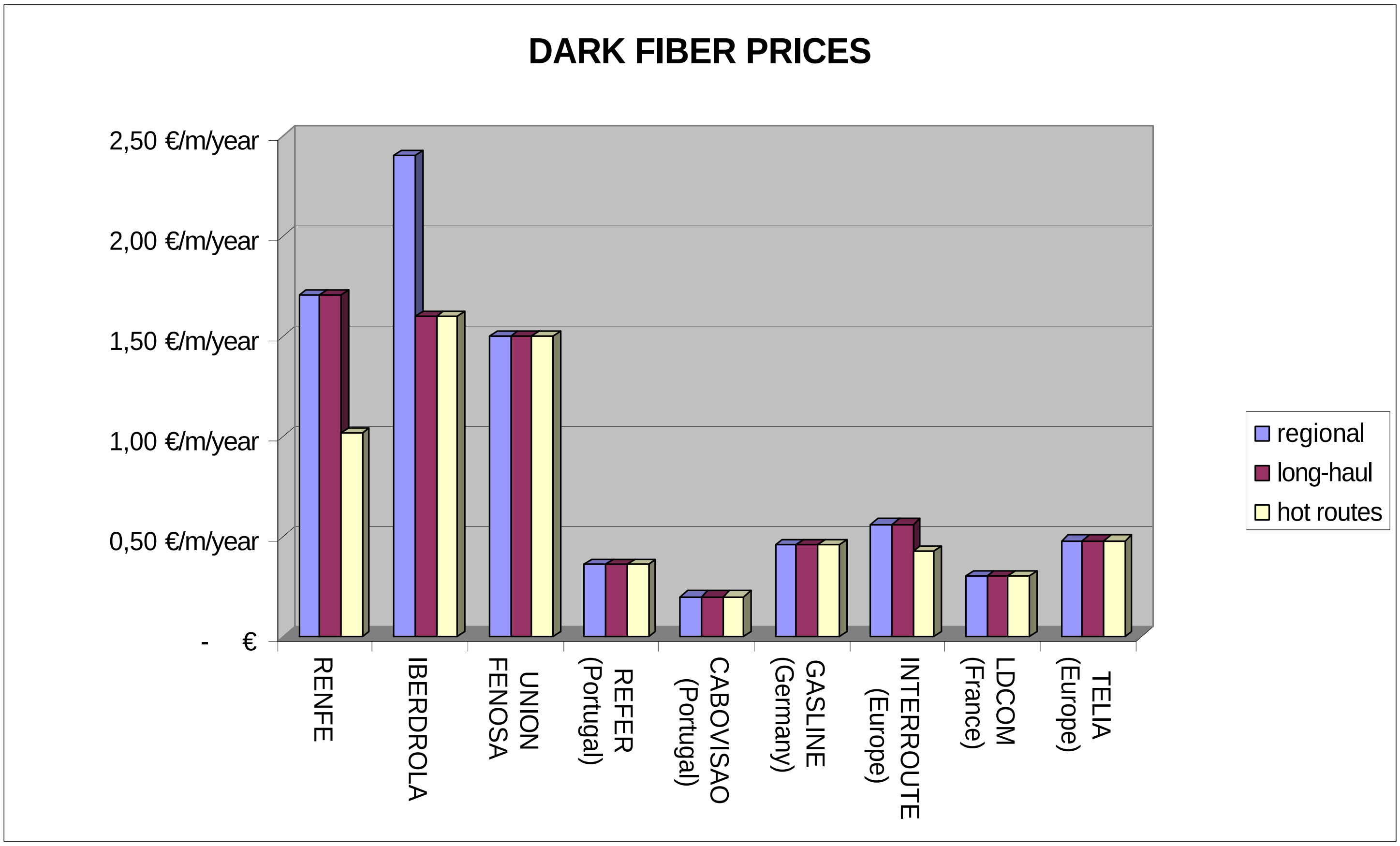
With regard to these two types of leased lines (CFV and SFV), RegTP further ruled that DTAG must offer to competitors precise delivery dates within the time limits defined by RegTP's decision of May 31, 2002. In case of late delivery, DTAG's offer must contain contractual penalties of five percent of the monthly rental fee payable per calendar day of exceeding the delivery date (which is already very generous to DTAG, compared with U.S. standards). The burden of proof, according to RegTP, is upon DTAG, which means that DTAG must demonstrate that the late delivery is not DTAG's fault.

However, this RegTP decision has never been implemented due to a preliminary injunction issued of the Cologne Court on October 15, 2002, as CompTel mentions correctly in its comments. The Court held, in particular, that (1) DTAG should only be obliged to offer competitors conditions it offers to its own divisions and subsidiaries, and that (2) the burden of proof is upon RegTP to demonstrate that these conditions exist and what their scope is. Given the current policy of secrecy at DTAG, this standard is almost impossible to comply with. RegTP has appealed the Court's decision and suspended the implementation of its decision regarding the provisioning intervals and penalties. Without a change in the law, the issue will probably be held up in the court system for years.

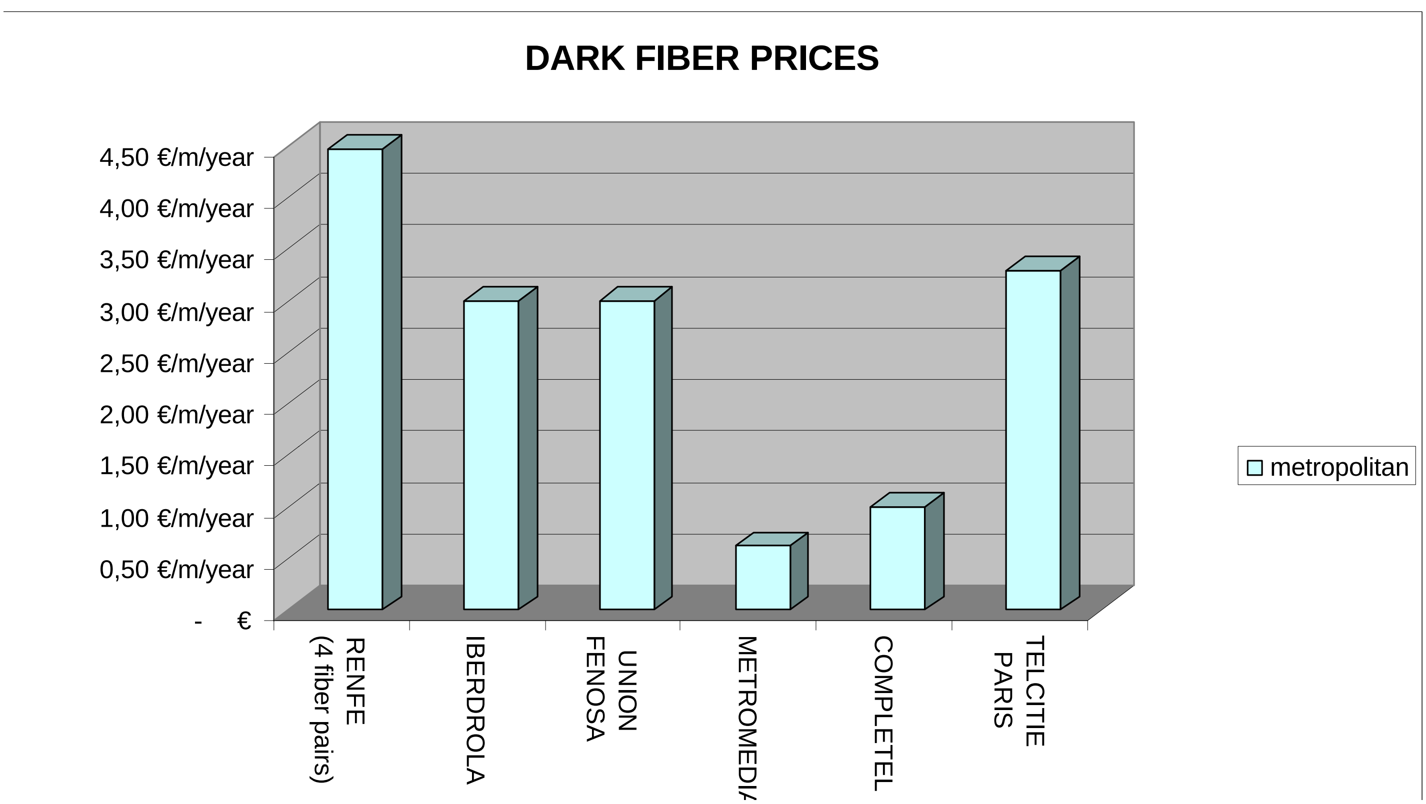
(3) Dark Fiber Costs in Europe, in Particular in Spain

Under Section 1.1 of the *Reference Paper* all signatories are prohibited, among other things, to maintain measures that prevent a major supplier from engaging in or continuing anti-competitive practices. In this regard, LambdaNet is facing serious problems in reaching dark fiber agreements with European incumbents and other local carriers because of the high prices that incumbents charge in this market sector. This is a significant obstacle in competing effectively and efficiently with incumbent backbone providers. LambdaNet asks the USTR to raise this issue with the European Commission and the national governments in Europe and to urge for a significant reduction and harmonization of these costs within the EU.

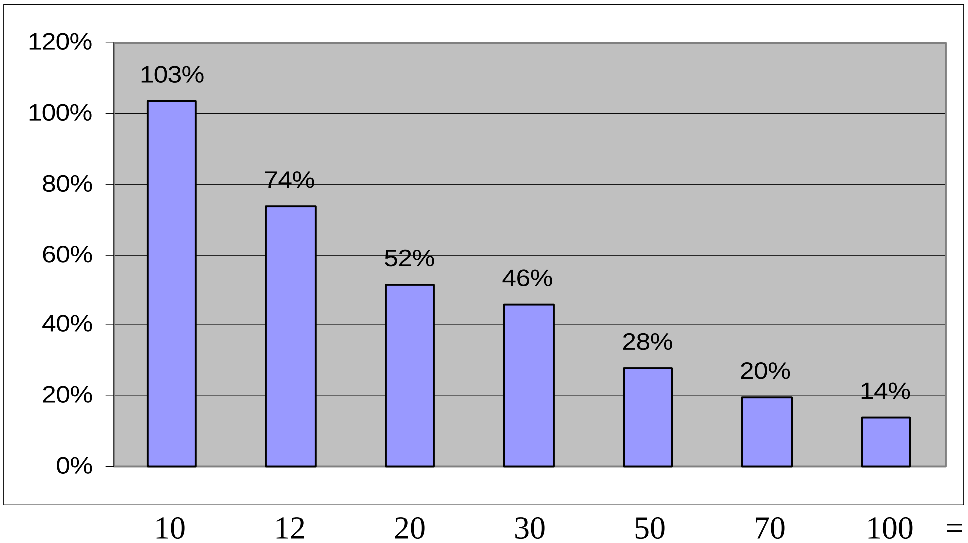
Spain, where LambdaNet is an active player, is a striking example for the current situation in Europe in the dark fiber market: The average fibre price in Spain is Euro 1.50, compared to the average EU rate of Euro 0.5. For new entrants, such as LambdaNet, this means that operative margins are very slim. Spain reached the European price levels for international links with origin in Spain by end 2002 and will reach the European price level for national links during 2003. The telecommunications crisis has frozen the investments of carriers in backbone network deployment. In general, European carriers now buy and sell their network capacity on a pay-per use basis, rather than selling and buying big pipes with may lead to network capacity being idle. This development has lead to a price decline for bandwidth links of 20% from 2000 to 2001. Long-haul links have experienced particularly dramatic price cuts of 50% to 70% in 2002. Due to high infrastructure costs and smaller operative margins several carriers were forced into bankruptcy (e.g. KPN-Qwest) or suffer from price squeezing. Of particular concern is the market behavior of Renfe, the Spanish railways company, that owns a large fiber network along the railways. Renfe customers are canceling fiber contracts (such as Jazztel, Aló, Metrored and GTS), even though they are facing steep cancellation fees . Other carriers (Uni2, BT, ONO, TYCO) could be forced to shut down their network completely**.** Unlike the local incumbent and a couple international carriers, a new entrant cannot offset these steep dark fiber prices by very high voice traffic as these companies can do due to their legacy businesses. For a new entrants, the local carriers in Spain constitute a “closed shop” since they have no interest in price cuts to provide fiber to new entrants. LambdaNet believes that this practice is anti-competitive.



For metropolitan Dark Fiber in Spain, the average fibre price in Spain is Euro 3.50 vis-à-vis Euro 1.5 as the European average. This creates a serious bottleneck for high capacity end to end solutions that new entrants want to offer:



The following viewgraph illustrates the typical ratio between Dark Fiber costs and revenue for a competitive carrier. It clearly demonstrates that the costs for obtaining dark fiber are very critical for a competitor, in particular during the start-up phase of its business.



= Revenue in Mio Euro

This means that Dark Fiber rental costs will be between 70% and 50% of LambdaNet España near to mid term revenue. Only a massive reduction of 60% of these charges would allow LambdaNet España to generate a profit. Moreover, according to the Renfe standard agreement on Dark Fiber, the new entrant faces major cancellation fees and guarantees for the complete term of the contract (12 years) that are anti-competitive. The excessive charges for Dark Fiber and burdensome contractual obligations are clearly a serious impediment for a new entrant and stifles competition. If the situation in Spain does not improve, LambdaNet España may be forced to shut down its Spanish operations.

Please do not hesitate us if you have any questions.

Respectfully submitted,

LambdaNet Communications GmbH

By: Bernie Smedley, CEO
LambdaNet Group

Georg Merdian,
Director Legal & Regulation
LambdaNet Communications Gmbh